83-1650

NO. _____

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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

JONEZ P. SUTHOFF
FRANCES P. MILLER
INEZ W. PHILIBERT

PETITIONERS

VS.

YAZOO INDUSTRIAL DEVELOPMENT CORPORATION
YAZOO COUNTY, MISSISSIPPI
YAZOO COUNTY PORT COMMISSION
YAZOO CITY, MISSISSIPPI
YAZOO PUBLIC SERVICE COMMISSION
WILLIAM H. BARBOUR
TOM CAMPBELL, JR.
E. A. SMITH
WILLIAM T. NEELY
JOEL STEVENSON

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DIXON L. PYLES
(Counsel of Record)
PYLES & TUCKER
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

ATTORNEYS FOR PETITIONERS

QUESTIONS TO BE PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit in Suthoff II could disregard, overrule and convert the previous holding in Suthoff I that the abusive governmental conduct of the respondents was sufficient to raise an ordinary tort to the stature of violations for deprivation of property under Amendments V and XIV to the United States Constitution and 42 U.S.C. § 1983, to "abuse of process" under Mississippi laws and apply the one year statute of limitations under § 15-1-35 (1972) Miss. 1972 Code annotated?

2. Whether the Fifth Circuit properly applied Mississippi's one year statute of limitations, § 15-1-35 (1972), to petitioners' causes of action, based on federal constitutional and statutory violations as a result of the breach of duties on the part of the respondent public officials in dealing with petitioners?

3. Did the district court and Fifth Circuit foreclose petitioners' suit before they had an opportunity to discover all of the essential elements of a cause of action by applying Mississippi rule as to "accrual" rather than the federal law?

4. Were the respondents estopped to invoke all statutes of limitation because of the existence of the confidential and fiduciary relationship existing with the petitioners?

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VS.

YAZOO COUNTY INDUSTRIAL DEVELOPMENT CORPORATION, ET AL.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Jonez P. Suthoff, Frances P. Miller and Inez W. Philibert, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 22, 1983.

OPINIONS BELOW

The opinion (Suthoff II) of the Court of Appeals, not yet reported, appears in the Appendices as Appendix I hereto. The opinion of the District Court for the Southern District of Mississippi, appears as Appendix II; and the two judgments appear as Appendices III and IV, respectively. The opinion and judgment of the district court have not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on December 22, 1983. A timely petition for rehearing was filed; it was denied on February 17, 1984; and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is envoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved are the Fifth and Fourteenth Amendments to the Constitution of the United States. The full texts of constitutional amendments are set forth in the Appendices designed V and VI.

The federal statutes involved and the full texts and appendices designations are

(a) 42 U.S.C. § 1983, Appendix VII;

(b) 42 U.S.C. § 4651, Appendix VIII;

(c) 42 U.S.C. § 4655; Appendix IX.

Mississippi Code 1972 Annotation (MCA) provisions involved and set forth in the appendices are

(a) § 15-1-9. Limitations applicable to suits in equity to recover land. Appendix X;

(b) § 15-1-35. Limitations applicable to actions for certain torts. Appendix XI;

(c) § 15-1-39. Limitations applicable to actions involving certain trusts. Appendix XII:

(d) § 15-1-49. Limitations applicable to actions not otherwise specifically proved for. Appendix XIII;

(e) § 15-1-67. Effect of fraudulent concealment of cause of action. Appendix XIV;

(f) § 15-1-69. Commencement of new action subsequent to abatement or defeat of original action. Appendix XV.

STATEMENT OF THE CASE

On February 16, 1979, the petitioners brought an "inverse condemnation" action in the federal district court against five public agencies of Mississippi and five individuals. The complaint charged with specificity that the respondents entered into a conspiracy to force the petitioners to sell their private property at one-fourth its value to Yazoo County so that the property

could be used for public purposes by the Yazoo County Port Commission and the Yazoo County Industrial Development Corporation. The latter two public agencies did not have expropriation powers.

Yazoo City was induced to institute proceedings in the county court to expropriate 82.43 acres of the 122 acre tract of the petitioners property falsely claiming that the portion was to be used for sewerage disposal. The true and sole purpose was to coerce the petitioners into selling their property at a fraction of its value to the county. Yazoo City never had any intent to acquire the property for the announced purpose. In fact the city covertly dismissed the expropriation proceedings when it had served its coercive purpose.

Yazoo County "took" 22.75 acres for which no compensation was paid; and 99.25 acres were "taken" without just compensation. By the coercive tactics the respondents forced the private landowners to sell their

property at a price which was only one-fourth of its real value. Petitioners charged that 122.65 acres of their private property were wrongfully "taken" from them by Yazoo County for public use without just compensation in violation of Amendments V and XIV of the Constitution of the United States, and they were denied due process and the equal protection of the law.

Certain public officials and private persons conspired to misuse the expropriation powers of Yazoo City by institution of eminent domain proceedings with no intent to actually condemn, but solely to coerce the private landowners to sell their private property at a price far below the actual value to the conspirator entities who were not parties to the condemnation proceedings. Thus stating a claim under 42 U.S.C. § 1983 for deprivation under color of state law of individual federal constitutional rights. The allegations of the complaint were drawn so as to seek recovery under the federal

constitution and a federal statute. The petitioners also charged the respondents with fraud, deceit, abuse of process, and breach of a fiduciary trust. In the alternative, petitioners sued to recover the land, based upon the concealed fraud, deceit and coercion of the respondents.

On March 12, and 14, 1979, in Suthoff I, the respondents, seeking dismissal of the civil action, filed motions under Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure contending no subject matter jurisdiction or basis for a federal claim for relief existed. On June 22, 1979, the district judge filed his "Memorandum Opinion" (unreported) holding that the district court was without subject matter jurisdiction because no Fourteenth Amendment or federal statutory right was presented; the petitioners could present no facts sufficient to afford jurisdiction; no amendment of the complaint would be permitted; and the complaint was dismissed. On February 17, 1981,

the Court of Appeals for the Fifth Circuit reversed in an opinion reported at 637 F.2d 337. The petition for rehearing was denied. 642 F.2d 822.

The respondents contended in Suthoff I "[t]he complaint at most alleges a tort claim." 637 at p. 340. The Court of Appeals rejected the contention of the respondents in the following statement:

> "[W]e are not persuaded by these contentions. In the first place, the tort alleged, if such it be, was accomplished by an abuse of governmental power sufficient "'to raise an ordinary tort by a government agent to the stature of a violation of the Constitution.'" Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980). In the second place-for purposes of maintaining initial federal jurisdiction, even though the property itself is not actually "taken"-allegations that an individual's property rights have been damaged, through a municipality's arbitrary misuse of instituted but abandoned state-law expropriation proceedings, adequately state a claim of deprivation of property without due process of law in violation of the federal constitution. Foster v. Herley, 330 F.2d 87 (6th Cir. 1964). See also Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784 (8th Cir. 1979); cf., Chacon v. Granata, 515 F.2d 922, 924 (n.3)(5th Cir. 1975).

> '[t]aking the facts alleged in the complaint as true, the plaintiffs have established their right to a day in federal court...."

Id.

Respondents petitioned for a writ of certiorari. On January 11, 1982, the United States Supreme Court denied the petition. 102 S.Ct. 1032.

In Suthoff II, on November 23, 1983, all defendants moved for summary judgement claiming

> "'[T]he cause of action alleged in the complaint is barred by the Mississippi's six year statute of limitations ... § 15-1-49...'" and by "[t]he...one year statute of limitations...§ 15-1-35."

On January 5, 1983, respondents Barbour and Neely filed a separate motion for summary judgment based on res judicate. On January 24, 1983, the district judge, for the second time dismissed the complaint granting summary judgment.

In Suthoff II, the district court ruled

> "[s]ince this action is based on an intentional tort, the Mississippi one (1) year statute of limitations is

applicable and the action is barred as provided in § 15-1-35, Miss. Code Ann. (1972).

"[i]f mistaken as to the applicability of the one (1) year statute, then the Mississippi six (6) year statute of limitation is applicable as provided in § 15-1-49, Miss. Code Ann. (1972).

"[T]he Court finds inapplicable the ten (10) year statute dealing with bills for relief, (§ 15-1-39)..."

The district court ruled that the prior state court decision as to Barbour and Neely constituted res judicata and estopped the petitioners in the federal court. Appendix II.

As early as May, 1963, the Philibert property was being considered as a prospective industrial site and the development of a harbour and port on the Yazoo River. On December 1, 1969, the Yazoo County Industrial Development Corporation (YIDC) made plans to acquire the property and construct the plant with federal funds. On October 1, 1969, Mrs. Ida T. Page, mother of Mrs. E. A. Smith, deeded property contiguous to the Philibert property on the south to her daughter. In

Late in December 1969, E. A. Smith, an official of Yazoo City and another public official attempted to buy the Philibert property for their own use. The petitioners were unaware of interest of the public entities in the Philibert property. Mrs. Philibert refused the offer of Smith to purchase. On February 10, 1970, the petitioners learned for the first time of the interest of the public entities in the Philibert property when an offer to purchase the acreage for $97,600 was made. Philibert again refused to sell. Yazoo City was directed by the Air and Water Pollution Control to construct and have in operation a sewage disposal plant prior to April, 1972. Federal funds were made available for a portion of the cost of the plant. The pressure on Philibert to sell the property increased. On October 16, 1970, Mrs. Philibert deeded each of her two daughters a one-third interest in the property.

Early in 1971, the public was informed that plans were being made to construct and

operate a sewage disposal plant on the Philibert property.

On November 10, 1971, an article appeared in the People's Press, a newspaper, to the effect that YIDC requested Yazoo City to select another location for the sewage disposal plant because the plant on the Philibert property would damage the existing industrial area to the north of petitioners' property. Respondent William Barbour, was listed as an officer of YIDC. The article did not reveal that YIDC was attempting to acquire the Philibert property. Petitioners did not learn until after August 24, 1974, that YIDC was interested in acquiring the Philibert property for its own uses. Petitioners learned for the first time on January 25, 1979, that respondent William Barbour had been a charter member and official of YIDC since 1957, and that respondent Barbour's representation of the petitioners was in conflict with the interests of YIDC. Ted Russell, another official of YIDC, appraised

82.43 acres of the Philibert property sought by Yazoo City at $114,000.

By August 25, 1971, respondents had been informed that Yazoo City would receive a grant of federal funds amounting to 55% of the cost of the sewage disposal plant from the Environmental Protection Agency (EPA), and an additional 25% of from the Mississippi EPA.

On September 2, 1971, Yazoo City filed the coercive condemnation suit. The city offered only $22,500 for the 82.43 acres. The respondents wholly failed to comply with mandatory requirement of the "Uniform Relocation Assistance and Real Properties Act of 1970," and actively concealed the statutory requirements and regulations thereasto from the petitioners. The fact that the coerced purchase of the petitioners property on February 22, 1972, was subject to 42 U.S.C. §§ 4651 and 4655 (App. VIII and IX) did not become known to petitioners until the deposition of respondent Campbell in 1983.

On September 3, 1971, respondent Barbour agreed to become associated with Neely in the representation of the petitioners, and in the defense of the condemnation suit. The petitioners were not informed of Barbour's conflict of interest. Without informing petitioners, Barbour and Neely hired appraiser Joel Stevenson. The respondents did not have an accurate survey made. Respondents misled the petitioners with reference to the acreage conveyed. Petitioners were led to believe they were conveying only 99.25 acres. Barbour and Neely did not answer the condemnation suit or offer any defense. Without authority from and without informing petitioners, Barbour started negotiating for a sale of the Philibert property on behalf of the Port Authority, with the connivance of the other respondents. In a letter dated September 9, 1971, Neely informed Campbell that all negotiations regarding "the matter" would be handled by Barbour.

On October 8, 1971, Campbell wrote Houston Evans and told Evans he would get him a description of the property if Evans needed one. Houston Evans made his verbal appraisal without a legal description of the property. Campbell informed Evans that the YIDC and the Port Authority had an interest in the property down to Short Creek as an industrial park. Campbell told Evans of a meeting attended by William Barbour, where the Port Authority directed Barbour, lawyer for the petitioners, to get a price from Philibert and a price from Page for the properties. The Port Authority was to buy all the property, and sell to Yazoo City a location for the sewage disposal plant on Short Creek. Respondents once again ignored the requirements of the Property Acquisition Act of 1970.

Respondent Joel Stevenson's first appraisal was dated "October 8, 1971." The appraisal had been made "as of September 15, 1971." Stevenson completed gathering the

data for this appraisal prior to August 30, 1971. Stevenson reported that the legal description includes only 72.28 acres to be condemned, and 26.97 acres which would be left, after the taking. The 3.03 acre tract, which Stevenson says he subtracted from 30 acres to arrive at 26.97 acres, was not sold to McGraw Curran Lumber Company until September 20, 1971.

Stevenson's appraisal contains 12 substituted pages which included figures supplied by William Barbour for the substitution. Fraudulently concealed from the petitioners was Stevenson's appraisal. Neely and Barbour refused to show Stevenson's appraisal report to petitioners, although requested so to do on numerous occasions. Stevenson did not finish the appraisal and substitute the pages until after the conveyance of the property on February 22, 1972 although it is falsely dated "October 8, 1971."

On behalf of Yazoo City and the Port Authority, Barbour continued to negotiate for the sale of the Philibert property. On November 18, 1971, Bridgeforth reported to Campbell that Barbour was to see Philibert on the "first of next week" and then "we" can possibly do something. Bridgforth said he also gave this information to Jeppie (Mayor Barbour). The city allowed the condemnation complaint to remain filed while these negotiations were taking place in violation of federal rules and regulations pertaining to the Property Acquisition Act of 1970.

Fraudulently concealed from the petitioners was the fact that on January 3, 1972, Tom Campbell was ordered by the Mayor and Board of Aldermen to dismiss the condemnation suit filed against the petitioners herein with all costs to be paid by the city. Campbell did not dismiss the suit. This failure was also in violation of "Rules and Regulations of Property Acquisition Act of 1970."

On January 11, 1972, the Public Service Commission met. It was reported that the city would buy a site for the sewage disposal plant from the Port Authority or the YIDC whichever was the purchaser of the Philibert/ Page properties. The engineers were ordered to proceed with necessary changes in their plans to move the sewage disposal plant to the Short Creek site. Also, on January 11, 1972, it was reported to the Port Commission that agreements have been consumated with Philibert representatives for the purchase of the Philibert property, and such agreements and understandings were being prepared. Petitioners had no knowledge of such agreements.

On February 2, 1972, Barbour, Russell and Neely met with Philibert, Suthoff and Miller in the Suthoff home. Barbour had a prepared deed and disbursement sheet that he presented to petitioners. Barbour fraudulently told the petitioners, "The city will let you sell to the Port Commission for

$100,835 but it will continue the condemnation suit if you do not." He also said that petitioners could not get a fair trail in Yazoo County. Barbour told the petitioners that if the county did not have to pay the Corps of Engineers the $11,900 for the easement interest, he would personally see that they got that amount. The county has not had to pay for the easement. Petitioners have not received the $11,900.

Concealed from the petitioners was the fact that the legal description in the original deed did not close in one of the tracts to be conveyed. On February 15, 1972, Barbour mailed Neely substitute pages 3, 4 and 5 for insertion into the warranty deed. Petitioners did not learn of the substitution until 1983. Page four of the substituted pages contains a "Cover all Clause." Other changes were also made in the original deed. Neely and Barbour concealed all of this information from petitioners. On February 12, 1972, Barbour wrote to Neely

enclosing a deed to replace the original deed which he had left with Neely on February 2, 1972. Barbour stated that the "Deed was finally approved by Walter Bridgforth." None of these changes or substitutions made to the original deed which had been shown to the petitioners on February 2, 1972, were ever called to the attention of the petitioners. Petitioners were led to believe by Neely and Barbour that they were only conveying 99.25 acres instead of 122.65 acres as shown by the disbursement sheet prepared by Barbour.

On February 8, 1972, Bridgforth reported to the Port Commission that the public agency would acquire 118.65 acres of petitioners' property for $100,835. The value of 99.25 acres was represented to the petitioners as $100,835. The respondents acquired 23.4 acres of petitioners' property without any compensation. The 23.4 acres were valued at $93,600 on February 22, 1972.

Prior to signing the deed, Miller, Suthoff and Philibert went to Neely's office

and inquired about the condemnation suit. Neely falsely told the petitioners the suit was still pending, and said, "You can't fight City Hall."

Neely and Barbour occupied a confidential and fiduciary relationship with the petitioners. The petitioners reposed confidence in and relied on Neely and Barbour. The other respondents combined with, conspired and acted in concert with Neely and Barbour to deceive and defraud the petitioners. The respondents were guilty of actual and constructive fraud against the petitioners.

It was the obligation of Neely and Barbour to made full disclosure to petitioners of Barbour's official position with respondent YIDC, a public agency attempting to acquire the Philibert property. Neely and Barbour failed to disclose Barbour's official position with YIDC or that YIDC was an agency attempting to acquire the property. Petitioners would not have employed Barbour had

they been advised of his official connection with YIDC and of YIDC's interest in acquiring the property. Neely and Barbour fraudulently concealed Barbour's official position with respondent YIDC. Barbour should not have accepted employment to represent petitioners because the employment created a conflict of interest with his public responsibilities. Neely and Barbour fraudulently concealed the fact that the condemnation suit filed by the respondent Yazoo City had been ordered by the city on January 3, 1972, to be dismissed. Neely and Barbour fraudulently concealed from the petitioners that on January 11, 1972, the city had made the decision not to construct the sewage disposal plant on the Philibert property, but on the Page property; that the condemnation suit had been remanded to the files for lack of action on February 16, 1972. Neely and Barbour misrepresented the facts by fraudulently and falsely stating to petitioners that the city was going to try the condemnation suit to acquire their

property for the construction of the sewage disposal plant; that petitioners could not win the suit against Yazoo City in the Yazoo County Court; that petitioners would receive only $22,500 for the property if they did not agree to sell to described property to the Port Authority for $100,835. Neely and Barbour fraudulently concealed the alteration of the warranty deed shown to the petitioners on February 2, 1972, by surreptitiously substituting pages 3, 4 and 5 therein on February 15, 1972, and concealing the substitution from the petitioners.

In January, 1974, petitioner Suthoff, for the purpose of qualifying as a real estate sales person, took a course in this field. The prescribed manner of handling real estate sales as taught in the course was considerably different from the manner in which the sale of petitioners' property had been managed. Subsequent to August 24, 1974, through the efforts of attorney Grant Tharpe, petitioner Suthoff obtained from Neely a copy

of respondent Stevenson's appraisal report. The appraisal was very questionable. On January 25, 1979, the petitioners learned for the first time that respondent Barbour, since 1957, had been an officer of respondent YIDC. Prior to February 22, 1972, the petitioners owned 122.65 acres in the tracts taken by the respondents. The value of the 122.65 acres on February 22, 1972 was $490,600.

On February 21, 1978, petitioners Philibert, Suthoff, and Miller, pro se filed a civil action for damages in the circuit court of the First Judicial District of Hinds County against respondents Barbour and Neely. The suit was for malpractice based upon negligence. On April 4, 1978, a pleading designated "Joint General Demurrer" was filed by Barbour and Neely. This pleading was never served on the petitioners. No answer or any other written pleadings were filed in the state court. On October 9, 1978, the circuit judge wrongfully signed an order dismissing the petitioners' civil action.

The dismissal order recites that on October 9, 1978

> "[t]his cause having come on to be heard on the oral motion of defendants...for dismissal, and the defendants having appeared... and the plaintiffs having failed, neglected and refused to appear at said setting and the defendants having announced to the court their readiness to proceed...and it appearing unto the court that the motion is well taken and should be sustained... the cause should be and it is hereby, dismissed."

On October 23, 1978, the petitioners moved by verified motion to (1) set aside the wrongfully entered "Order of Dismissal"; (2) reinstate the cause of action to the docket; enter an order setting a hearing on the motions; (3) to strike the insufficient demurrers; and enter a default judgment against the defendants. The court entered its order, on October 23, 1978, that the motions of plaintiffs be set for hearing during the November 1978 term of the court on a date and time to be agreed on by the parties convenient for the court. No date was ever set for the motions and they are

presently pending. The court ordered that all pending motions be carried over for hearing and decision in vacation or the next term. The state court did not sustain the so called "Joint General Demurrers." The matter heard on October 9, 1979, was on the "[o]ral motion of defendants...for dismissal..."

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN SUTHOFF II CONFLICTS WITH THE DECISION IN SUTHOFF I

The Court of Appeals for the Fifth Circuit in Suthoff II (App. I) ruled

> "[T]he district court characterized the plaintiffs' action as one based on an intentional tort for which there existed an adequate remedy at common law, therefore finding applicable Mississippi's one-year limitations statute for intentional torts, Miss. Code Ann. § 15-1-35 (1972)...
>
> "[T]he cause of action under Mississippi law most analogous to the plaintiffs' claim is that of "abuse of process", being "the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so, and with resulting damages..."

> "[I]n our opinion the plaintiffs' complaint was properly characterized by the district court as alleging an action governed by Mississippi's one-year intentional tort statute..."

The decision of the Fifth Circuit in Suthoff II conflicts with the decision in Suthoff I, which held

> "[T]he plaintiffs had, inter alia, specifically alleged conduct of the defendants that had allegedly under color of state law deprived them of property rights without due process of law in violation of the Fifth and Fourteenth Amendments, citing as 42 USC § 1983...

Suthoff v. Yazoo Cty. Indus. Development Corp., 637 F.2d 337 (CA5 1981) at page 338, emphasis supplied

> "[1,2] Clearly the allegations of the complaint are drawn so as to seek recovery under both the federal constitution and a federal statute...(Id. at p. 339)

> "[S]ufficient to sustain § 1983 federal jurisdiction are allegations of concerted action by public and private persons to deprive individuals of federal constitutional rights under color of state law... A § 1983 action may be based on wrongful deprivation of property by persons acting under color of state law. Lynch v. Household Corp., 405 U.S. 538, 92 S.Ct 1113, 31 L Ed 2d 424 (1972). Action taken under color of state law may include '[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law,' Monroe v.

Pape, 365 U.S. 167, 184, 81 S.Ct. 473, 483, 5 L Ed 2d 492 (1961)...(Id. at p. 340).

"[t]hat the tort alleged, if such it be, was accomplished by an abuse of governmental power sufficient to 'raise an ordinary tort by a government agent to the stature of a violation of the constitution' William v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980)...allegations that an individual's property rights have been damaged through a municipality's arbitrary misuse of instituted but abandoned state law expropriation proceedings, adequately state a claim of deprivation of property without due process of law in violation of the federal constitution. Foster v. Herley, 330 F.2d 87 (6th Cir. 1964). See also Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784, (8th Cir. 1979); cf. Chacan v. Granata, 515 F.2d 922, 924 (N.3) (5th Cir. 1975)..." (Id. at p. 340. Emphasis added).

In Suthoff I it is apparent that the Fifth Circuit found that the respondents committed on independent tort which was accomplished by abuse of government power sufficient to raise an ordinary tort to the stature of a violation of the constitution. The respondents actions with regard to the petitioners were intentional wrongs and abuses which amounted to an independent tort, and which evinced a ruthless disregard for

the rights of the petitioners.

In Suthoff II the court said

> "[B]ecause no statute of limitations was enacted to govern actions brought pursuant to § 1983, federal courts must "borrow" the state statute of limitation governing analogous causes of actions... The district court characterized the plaintiffs' action as one based on an intentional tort for which there existed an adequate remedy at common law, therefore finding applicable Mississippi's one year limitations statute for intentional torts, Miss. Code Ann. § 15-1-35 (1972)..."

On February 28, 1984, in the Southern District of Mississippi, District Court Judge Dan M. Russell, Jr. in Roy Harris v. Combined Insurance Company of North America, Civil Action No. S81-0553(R), and in Lonnie Lee Cuevas v. National Fire Insurance Company, Civil Action No. S82-0589(R), refused to apply the one year statute of limitations under § 15-1-35 because the statute contains an inclusive listing of "intentional torts" subject to the one year limitation period, and because under Mississippi decisions the

one year statute of limitations has no application to "independent torts" which embraces all torts not merely "intentional ones." The court said to apply the one year statute of limitations under § 15-1-35 (1972) would be overly restrictive and result in a misapplication of clear legislative intent. The district court denied the defendants' motions for summary judgment. The memoranda opinions in Harris and Cuevas are included in the Appendices as Appendix XVI and XVII, respectively.

The Fifth Circuit in Suthoff II "borrowed" the wrong Mississippi statute of limitations in selecting § 15-1-35 (1972).

2. THE DECISION IN SUTHOFF II CONFLICTS WITH OTHER DECISIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

The decision in Suthoff II conflicts with the following decisions of the Court of Appeals for the Fifth Circuit:

(a) Morrell v. City of Picayune, 690 F.2d 469 (5th Cir. 1982);

(b) Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976);

(c) Harrison v. United States, 81-2501 rendered July 5, 1983 (5th Cir.) included in the Appendices as Appendix XVIII.

The decision in Suthoff II is in conflict with the decision of the Fifth Circuit in Morrell v. City of Picayune, 690 F.2d 469 (5th Cir. 1982). Morrell sued the City, its police department and various policemen, invoking 42 U.S.C. § 1983 and asserting constitutional rights. The district court concluded that the one year Mississippi limitations provision of § 15-1-35 (1972) governing actions for assault and battery applied. Since the action was filed 13 months after the incident, the district court granted summary judgment on the one year statute of limitations. The Fifth Circuit reversed stating that long ago the Mississippi Supreme Court determined that § 15-1-35

(1972) did not apply because the breaches of duty which all persons owe to every other person were not applicable to causes of action based on the breach of duties by public officials. The Fifth Circuit cited State for the use of Smith v. Smith, 156 Miss. 228, 125 So. 825, 826 (1930). The court said

> "[t]he square holding of the Mississippi court in Smith is that the one year statute governing actions for intentional torts by ordinary citizens does not apply to torts by police..."

Petitioners' action is against public entities and public officials. The district and Fifth Circuit courts both disregarded the Mississippi rule that intentional torts by ordinary citizens does not apply to governmental bodies and officials.

The decision in Suthoff II conflicts with the decision in Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976). In Suthoff I the court said that petitioners sought recovery under the federal constitution and 42 U.S.C. § 1983. Since § 1983 is a federally-created

right of action, the Fifth Circuit was duty bound to ultimately ground its choice of which Mississippi statute of limitations should apply on the basis of which statute would best effectuate the Congressional policies underlying § 1983.

The Fifth Circuit in Suthoff II defined the nature of petitioners' multi-claims as an "abuse of process," and without any basis, applied the one year statute of limitations under § 15-1-35 (1972). "Federal policy neither requires nor allows the federal courts to define the nature of the actions in one mold for purposes of determining the statutory period..." Beard v. Stephens, 372 F.2d 685, 690 (5CA 1967).

In McCorkle, the court described a two step process to find the most analogous cause of action. The first step is the determination based on federal law of the essential nature of the federal claim. The second step is to determine the state statute of limitations most applicable to the federal

claim. In McCorkle the court refused to apply the one year statute of limitation to § 1983 under the two step process. The court also considered a one step process which asked which limitation period the state would have enforced had the petitioners brought the claims for redress of constitutional tort and 1983 actions in the state court. Under the one step method the Fifth Circuit also refused to apply the one year statute of limitations in McCorkle.

The decision of the Court of Appeals for the Fifth Circuit in Suthoff II conflicts with Harrison v. United States, No. 81-2501 (5th Cir. 1983).

The district court dismissed Harrison's suit as barred by the two year statute of limitations of the Federal Tort Claims Act. The Fifth Circuit reversed and remanded and said it was essential to distinguish between "knowledge" and "belief", and conclusions based on intuitions, suspicion, conjecture, speculation, or faulty reasoning, even if

true do not rise to the level of knowledge. Prior to August 24, 1974, the petitioners had only beliefs and suspicions that they had not been treated properly.

In Harrison the plaintiff consulted doctors and a lawyer in an attempt to determine whether she had a cause of action. The petitioners in Suthoff II consulted lawyers, engineers and appraisers in an attempt to determine what their rights were and whether they had a cause of action.

Prior to August, 1974, petitioners consulted several lawyers in an attempt to determine whether they had a cause of action. They sought advice from lawyers based purely on their suspicions, just as did Harrison in her consultation with doctors. Each attorney whom the petitioners consulted informed them that they did not have sufficient basis to file a law suit. The lawyers told the petitioners that they found no basis for legal action on the intuitive conclusions which petitioners expressed relative to the fraud

and deceit to which they suspected they had been subjected.

The petitioners obtained certain records and appraisals after August, 1974, but in respect to filing their civil action, they continued to run into a stonewall as did Harrison. The best legal advice the petitioners could secure from February 16, 1972, until August 24, 1974, was of no assistance to them in determining whether a suit against the respondents could be successfully prosecuted. All of the lawyers whom the petitioners consulted said they had no injury nor a basis for a cause of action against the respondents. The petitioners were unable to provide persuasive information of injury or causation to the lawyers whom they consulted, because the petitioners were not conversant with the legal procedures, and they had been unable to obtain sufficient facts to warrant the filing of a suit prior to February 16, 1979.

Prior to August 24, 1974, the only direct evidence sufficient to justify legal action was contained in the records under the control of and in the knowledge of the respondents, so that the petitioners and the lawyers whom they consulted could do no more than speculate on the possible source of an injury and cause of action. The injury and causes of action were not overlooked, they were hidden from the petitioner.

The court in Suthoff II said "[i]t is the concealment of the cause of action that acts to toll the running of the limitation period..." In Harrison the Fifth Circuit pointed out that the statute does not begin to run until the plaintiff discovers or in the exercise of reasonable diligence should discover her injury and its cause. (Harrison, p. 5554). The petitioners must have had knowledge of facts that would lead a reasonable person to (a) conclude that there was a causal connection between the acts of all of the respondents and petitioners'

injuries or (b) seek professional advice, and then with that advice, to conclude that there was a causal connection between the actions of the respondents and their injuries. (Id.) The petitioners consulted four lawyers between February 22, 1972 and August 24, 1974, who advised them that on the facts in petitioners' possession there was no basis to conclude there was an injury or a causal connection to justify a suit being filed.

The court in Suthoff II failed to distinguish between "knowledge" and "belief." This distinction is an explicit and essential requirement as set forth in Harrison. (p. 5554).

Prior to August 24, 1974, the petitioners had only

> "[c]onclusions based on dreams, intuitions, suspicions, conjecture, ESP, or faulty reasoning, (which) even if true are merely 'belief.' Absent of a reasonable basis these conclusions do not rise to the level of knowledge." (Id.)

In Suthoff II the court did not distinguish between knowledge and mere belief.

The factual situation in Harrison is closely analogous to the facts in Suthoff II, and "The Law" set forth in the opinion of the Fifth Circuit is "The Law" which should have been applied, but was not.

In Harrison, the Fifth Circuit said:

> [4,5] The situation Harrison faced is exactly the type of situation referred to by Justice White in United States v. Kubrick, when he observed that "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." 444 U.S. at 122, 100 S.Ct. at 359. In such an instance other conditions being met, the statute of limitations is tolled. (Emphasis Supplied)

The Fifth Circuit refused to apply the rule announced in Kubrick to Suthoff II.

The panel decision in Suthoff II conflicts with Lavellee v. Listi, 611 F.2d 1129. The district court sustained the defendants' motion for summary judgment on the one year prescription period provided by Louisiana law and dismissed Levelle's § 1983 claim. The Fifth Circuit reversed in part holding that the district court erred in applying Louisiana law instead of federal law to determine

when the cause of action accrued in Levelle's civil rights suit.

The Fifth Circuit in Suthoff II rendered a decision which allows the statute of limitation to commence running before the petitioners were or should have been aware of the causal connection between their injuries and the acts of the respondents. Petitioners were not even aware of the names of all of the respondents and the part which the public agency respondents played in causing injury to them until shortly before February 16, 1979.

Mississippi's "borrowed" statute of limitations should have been tolled by the district and appellant courts in conformity with federal doctrine where the rights sought to be vindicated are creatures of the federal constitution and statute. The established rule is that where the petitioners were injured by fraud or concealment and remained in ignorance thereof until subsequent to August 24, 1974, without any fault or want of

diligence on their part until their discovery of the injury done them, then the limitation period did not commence to run until petitioners discovered the fraud. Briley v. State of Cal., 564 F.2d 849, 855 (9th Cir. 1977). In light of the prevailing federal doctrine as to fraud and concealment, the broad remedial policies of § 1983 are best served by holding that Mississippi's limitation period did not commence to run until petitioners discovered the fraud or could have done so by the exercise of reasonable diligence.

3. THE DECISION OF THE FIFTH CIRCUIT IN SUTHOFF II AS TO WHEN PETITIONERS' CLAIMS ACCRUED CONFLICTS WITH THE DECISIONS IN COURTS OF APPEALS IN OTHER CIRCUITS

The issue as to whether it was proper to grant summary judgment on the question of when petitioners' claims accrued under the circumstances of this case is in itself sufficient to preclude the summary judgment. It is admitted that there are many disputed factual issues, but the Fifth Circuit ruled

summary judgment was proper on the narrow issue of the statute of limitations. The decision conflicts with the decisions in the courts of appeals in other circuits.

The Congress did not set a tolling period for § 1983 actions. Mississippi's law concerning time of accrual is in no sense "loaned" to the body of federal civil rights law. The point at which a § 1983 claim accrues as well as the time of accrual is a question of federal law. Portis v. United States, 483 F.2d 670, 672 n.4 (4th Cir. 1973). The Fifth Circuit made the determination on the basis of Mississippi law holding that the petitioners' rights of action accrued on February 22, 1972, when the deed was executed.

In Exnicious v. United States, 563 F.2d 418, the district court rendered summary judgment on the ground that the action for malpractice was time barred. The district court concluded that in May, 1972, the plaintiff discovered acts construing the

alleged malpractice which was more than two years before filing his claim. Under the federal rule a claim accrues when the claimant discovers or in the exercise of reasonable diligence should have discovered the alleged malpractice.

> "[L]imitations should not bar a claimant before he has a reasonable basis for believing he has a claim. Therefore until a claimant has a reasonable opportunity to discover all of the essential elements of a possible cause of action ... - damages, duty, breach and causation - his claim...does not accrue. Bridgford v. United States, 550 F.2d 978, 981-82 (4th Cir.). And where a claimant is given a "credible explanation" of his condition not pointing to malpractice, he may not be found to have failed to exercise reasonable diligence because he did not earlier pursue his claim. Jordon v. United States, 503 F.2d 620, 624 (6th Cir.). (Emphasis Supplied; fn.7 omitted).

The summary judgment papers must be viewed in the light most favorable to the petitioners, and the court was duty bound to consider factual inferences in the light most favorable to petitioners, and to consider all factual inferences in the light most favorable to the existence of such issues. The

respondents are required to demonstrate entitlement beyond a reasonable doubt, and if an inference can be deduced from the facts on which the petitioners might recover, summary judgment is inappropriate. In a case such as this it must appear conclusively from the record that the petitioners knew or should have known of the alleged wrongdoing of all of the respondents at a time beyond the limitation for summary judgment to be granted. It reasonably could be inferred that the statement to petitioners that if they did not accept the offer of $100,830 to purchase their property made by Yazoo County, they would receive only $22,500 in the condemnation trial, did not put the petitioners on notice that the respondents were conspiring to defraud them and acquire their property for less than a fourth of its value, and that the conspiracy was the cause of their problems. On February 22, 1972, the petitioners were aware only that Yazoo City was attempting to get their property. There

was nothing which conclusively showed that the statement that petitioners "could not fight city hall" could not reasonably have been accepted as a credible explanation for the statement of Barbour and Neely with no indication that the respondents had entered into a conspiracy to misuse the municipality's expropriation powers, by institution of proceedings not intended to condemn, in order to coerce the petitioners to sell their property at prices far below its value to entities not authorized by law to expropriate property. There was nothing on February 22, 1972, which conclusively showed to petitioners that the respondents were taking their property by so abusing the combined power of the governmental entities sufficient to raise the abuse to a violation of the Constitution of the United States and deprive them of their property without due process of law. The factual questions as to when petitioners had a reasonable opportunity to discover all the elements of a possible

cause of action - duty, breach, causation and damage are not so conclusively removed that summary judgment is proper. The rights given under the constitutional provisions and § 1983, allowing the suit, as stated in Suthoff I, are not served by barring the claims in Suthoff II, if petitioners' delay resulted from "blameless ignorance." Urie v. Thompson, 337 U.S. 163, 170, 69 S.Ct. 1018, 93 L.Ed 1282. When different ultimate inferences may be drawn, the case is not one for summary judgment. United States v. Diebold, Inc., 396 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed 2d 176; Webb v. Allstate Life Ins. Co., 536 F.2d 336, 339 (10th Cir.)

In Bridgford v. United States, 550 F.2d 978 (4th Cir. 1977), the court said that statutes of limitations governing tort actions should not operate to foreclose a suit before a potential claimant has a reasonable basis for believing that he has a possible cause of action; hence, until a claimant has had a reasonable opportunity to

discover all of the essential elements of a possible cause of action, i.e., duty, breach, causation and damages, his claim does not accrue.

In Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975), the district court granted judgment on the pleadings for the defendants holding, inter alia that her damage claim was barred by the North Carolina statute of limitations. The Court of Appeals for the Fourth Circuit concluded that the district court chose the correct statute of limitations but incorrectly applied it. As was done in Suthoff II, the district court in Cox applied state law to decide when plaintiff's cause of action accrued, and determined that plaintiff's cause of action accrued at the time of the sterilization operation, and consequently the three year limitation period had run before the suit was filed. In Suthoff II, the district and the Fifth Circuit courts improperly concluded the petitioners' cause of action accrued February 22, 1972, when the

warranty deed was signed and delivered. In Cox, the Fourth Circuit said

> "[F]ederal law holds that the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action...
>
> "[O]ur conclusion is buttressed by Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed 1282 (1963)..."

529 F.2d at p. 50

Under federal law the petitioners did not know of their injury until subsequent to August 24, 1974. The § 1983 action was timely filed.

In De Witt v. United States, 593 F.2d 276 (6th Cir. 1974), it is pointed out that the Third, Fourth, Sixth and Tenth Circuits recognize that statutes of limitations do not begin to run until the claimant has discovered, or has had a reasonable opportunity to discover, all essential elements of a possible cause of action.

The date when a cause of action accrues is a question of fact. Summary judgment is usually inappropriate on that question. In

Suthoff II, the district and Fifth Circuit Courts inappropriately determined there was no genuine issue of fact as to whether petitioners' cause of action had accrued on Feburary 22, 1972.

4. THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES AND RAISES SIGNIFICANT AND RECURRING PROBLEMS ON THE ACCRUAL OF A CAUSE OF ACTION UNDER THE CONSTITUTION OF THE UNITED STATES AND § 1983

The decision of the Court of Appeals for the Fifth Circuit in Suthoff II conflicts with decisions of the United States Supreme Court.

In United States v. Kubrick, 1979, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed 2d 259, the supreme court held that a claim accrues when the plaintiff knows both the existence of and the cause of his injury. The district and Fifth Circuit courts ruled on the basis of Mississippi law that petitioners' "abuse of process" cause of action accrued on February

22, 1972, when the deed was signed and delivered. On that date the petitioners did not know that they had been paid only one fourth of the value of their property taken for public use nor were they aware that the cause of their injury was the conspiratorial acts of the respondents. In fact, the petitioners did not even know who were conspirators on February 22, 1972. This knowledge did not come into the possession of the petitioners until subsequent to August 24, 1974.

In Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed 1282, 11 ALR 2d 252 (1949), the court held that a claim under the Federal Employers' Liability Act (FELA) did not accrue until plaintiff's injury manifested itself. The court refused to charge Urie with the "unknown and inherently unknowable" and held because of his "blameless ignorance" of the fact of his injury, his claim did not accrue under the FELA until the disease of silicosis manifested itself. 337

U.S. at 169, 170. The Urie doctrine has been applied to other claims, and it should be applied to § 1983 claims. Petitioners' § 1983 claims should be construed as not intended to run until the petitioners had in fact discovered that they had suffered injury (loss of three-fourths of the value of their property) or by the exercise of reasonable diligence they should have discovered the loss. The rule is a general rule and should be applied in cases of fraud and deceit.

The opinion of the Fifth Circuit in Suthoff II reflects and focuses on policy considerations growing out of the increasing number of courts utilizing in an unwarranted manner the combination of summary judgment procedure and statutes of limitations to improperly dispose of cases. The statutes of limitations were never intended to do away with the rule of "blameless ignorance."

The correctness of the decision of the Fifth Circuit is open to serious question. The evidence in the record show that the

complaint filed on February 16, 1979, was filed approximately four and a half years after August 24, 1974, the earliest date when it can be said petitioners became aware of their injury them and the cause thereof.

The relationship of the petitioners and the respondents was fiduciary in nature, and of a delicate, exacting and confidential character requiring of all defendants a high degree of fidelity and good faith. Gay v. Heller, 252 F.2d 313 (5th Cir. 1958). The relationship created a constructive trust. The breach of the respondents' duty of fidelity to the interest of the petitioners constituted constructive fraud. Fiske v. Buder, 125 F.2d 841 (5th Cir. 1942).

Section 15-1-39 (1972) was ignored by the Fifth Circuit in Suthoff II. The statute provides that suits in cases of the existence of a trust not cognizable by courts of common law and in all other cases not provided for shall be filed in ten years after the cause of action accrued. Robinson v. Strauther, 64

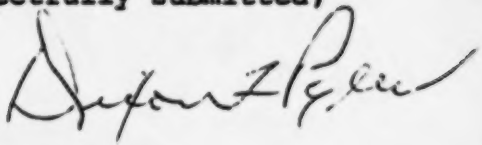
So. 724, 726 (Miss. 1914).

The respondents are estopped to invoke any statute of limitations because of the existence of the confidential and fiduciary relationship with petitioners. The doctrine of equitable estoppel is applicable to respondents in Suthoff II to prevent a fraudulent or inequitable resort to the statutes of limitations. 51 Am Jur 2d, Limitation of Actions, § 431; 45 ALR 3d 630 Annotation: Fiduciary or confidential relationship as affecting estoppel to plead statute of limitations.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,



DIXON L. PYLES
(Counsel of Record)
PYLES & TUCKER
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

Counsel for Petitioners

Dated: April , 1984

CERTIFICATE

The undersigned certifies that on the date set forth hereinafter, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to

VARDAMAN S. DUNN
Post Office Box 1046
Jackson, Mississippi 39205

WATKINS & EAGER
Post Office Box 650
Jackson, Mississippi 39205

HALEY BARBOUR
Post Office Box 960
Yazoo City, Mississippi 39194

Counsel for Respondents

The undersigned further certifies that all parties required to be served have been served.

DIXON L. PYLES
PYLES & TUCKER
507 East Pearl Street
Jackson, Mississippi 39201
(601) 354-5668

Counsel for Petitioners

Dated: April , 1984